

1 State of Arkansas  
2 93rd General Assembly  
3 Regular Session, 2021  
4

# A Bill

SENATE BILL 665

5 By: Senators B. Ballinger, Hill  
6 By: Representative Gonzales  
7

## For An Act To Be Entitled

9 AN ACT TO MODIFY THE STATUTES CONCERNING COVENANT NOT  
10 TO COMPETE AGREEMENTS; AND FOR OTHER PURPOSES.

### Subtitle

14 TO MODIFY THE STATUTES CONCERNING  
15 COVENANT NOT TO COMPETE AGREEMENTS.  
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18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
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20 SECTION 1. Arkansas Code § 4-75-101 is amended to read as follows:

21 4-75-101. Covenant not to compete agreements.

22 (a) A covenant not to compete agreement is enforceable if the  
23 agreement is ancillary to an employment relationship or part of an otherwise  
24 enforceable employment agreement or contract to the extent that:

25 (1) The employer has a protectable business interest; ~~and~~

26 (2) The covenant not to compete agreement is limited with  
27 respect to time, geographic scope, and ~~scope~~ type of commercial activity in a  
28 manner that is not greater than necessary to defend the protectable business  
29 interest of the employer; and

30 (3) The covenant not to compete agreement does not unduly  
31 burden:

32 (A) An employee's:

33 (i) Ability to obtain gainful employment; and

34 (ii) Freedom of movement; and

35 (B) The public, such as by unreasonably limiting  
36 competition in the employer's industry.



1 (b)(1) For the purposes of subsection (a) of this section, the  
2 protectable business interest of the employer includes the employer's:

3 ~~(1)(A)~~ Trade secrets;

4 ~~(2)(B)~~ Intellectual property;

5 ~~(3)(C)~~ Customer lists that are not compiled as a result of  
6 action by an employee;

7 ~~(4)(D)~~ Goodwill with customers that is not based on the  
8 action of an employee;

9 ~~(5)(E)~~ Knowledge of ~~his or her~~ the employer's business  
10 practices that are unique or peculiar to the employer;

11 ~~(6)(F)~~ Methods that are specialized and unique to the  
12 employer;

13 ~~(7)(G)~~ Profit margins;

14 ~~(8)(H)~~ Costs;

15 ~~(9)(I)~~ Other confidential business information that is  
16 confidential, proprietary, and increases in value from not being known by a  
17 competitor unless that information is available in the public domain;

18 ~~(10)(J)~~ Training and education of the employer's employees  
19 that is not provided in the regular course of employment; and

20 ~~(11)(K)~~ Other valuable employer data that the employer has  
21 provided to an employee ~~that an employer would reasonably seek~~ and has sought  
22 to protect or safeguard from a competitor in the interest of fairness.

23 (2) As used in subdivision (b)(1) of this section, "protectable  
24 business interest" does not include information available in the public  
25 domain.

26 ~~(c)(1) The lack of a specific or defined geographic descriptive~~  
27 ~~restriction in a covenant not to compete agreement does not make the covenant~~  
28 ~~not to compete agreement overly broad under subdivision (a)(2) of this~~  
29 ~~section if the covenant not to compete agreement is limited with respect to~~  
30 ~~time and scope in a manner that is not greater than necessary to defend the~~  
31 ~~protectable business interest of the employer~~ Whether or not a covenant not  
32 to compete agreement satisfies the requirements of subsection (a) of this  
33 section-

34 ~~(2) The reasonableness of a covenant not to compete agreement~~  
35 shall be determined after considering, among other things:

36 ~~(A)(1)~~ The nature of the employer's protectable business

1 interest;

2 ~~(B)(2)~~ The geographic scope of the employer’s business and  
3 whether or not a the covenant not to compete agreement’s geographic  
4 limitation is ~~feasible~~ appropriate under the circumstances;

5 ~~(C)(3)~~ Whether or not the restriction placed on the employee is  
6 limited to a specific group of customers or other individuals or entities  
7 associated with the employer’s business; ~~and~~

8 ~~(D)(4)~~ The nature of the employer’s business;

9 (5) The extent of the burden the covenant not to compete  
10 agreement places on the employee’s:

11 (A) Ability to obtain gainful employment; and

12 (B) Freedom of movement; and

13 (6) The extent of the burden the covenant not to compete  
14 agreement places on the public, such as limiting competition in the  
15 employer’s industry or by inhibiting the free movement of employees to  
16 markets and regions in need of the employee’s labor and skills.

17 (d) A post-termination restriction of ~~two (2) years~~ one (1) year is  
18 presumptively reasonable as to length of time under subdivision (a)(2) of  
19 this section unless the facts and circumstances of a particular case ~~clearly~~  
20 demonstrate that ~~two (2) years~~ one (1) year is unreasonable compared to the  
21 employer’s protectable business interest.

22 (e)(1) A covenant not to compete agreement shall be separately signed  
23 from any standard employment agreement and any other ancillary agreements  
24 with clear notice from the employer to the employee of the nature and scope  
25 of the covenant not to compete agreement.

26 (2) An employer shall provide a copy of the employee’s job  
27 description to the employee at the time of execution of a covenant not to  
28 compete agreement.

29 (3) If an employer fails to comply with subdivision (e)(1) or  
30 subdivision (e)(2) of this section, then the covenant not to compete  
31 agreement is unenforceable.

32 ~~(e)(1)(f)(1)~~ In a private court action, a court may award the employer  
33 damages for a breach of a covenant not to compete agreement, appropriate  
34 injunctive relief, or both, if appropriate.

35 (2) The immediate harm associated with the breach of a covenant  
36 not to compete agreement shall be considered irreparable to establish the

1 appropriateness of a preliminary injunction.

2 (3) This subsection does not limit:

3 (A) Any other defense available to a party against a claim  
4 for preliminary injunctive relief; or

5 (B) An employer's right to monetary damages for breach of  
6 a covenant not to compete agreement.

7 ~~(f)(1)(g)~~ If restrictions in a covenant not to compete agreement are  
8 found to be unreasonable and impose a greater restraint than is necessary to  
9 protect the protectable business interest of the employer allowed under  
10 subdivision (a)(1) subsection (a) of this section, the court shall reform the  
11 covenant not to compete agreement to the extent necessary to: covenant not to  
12 compete agreement is unenforceable.

13 ~~(A) Cause the limitations contained in the covenant not to~~  
14 ~~compete agreement to be reasonable; and~~

15 ~~(B) Impose a restraint that is not greater than necessary~~  
16 ~~to protect the protectable business interest.~~

17 ~~(2) The court shall enforce the covenant not to compete~~  
18 ~~agreement under the reformed terms and conditions.~~

19 ~~(g)(h)~~ An employee's continued employment is sufficient consideration  
20 for a covenant not to compete agreement.

21 ~~(h)(1)(i)(1)~~ This ~~subsection~~ section does not apply to a covenant not  
22 to compete agreement that is ancillary to other contractual relationships,  
23 including any type of agreement for the sale and purchase of a business,  
24 franchise agreement, and any other agreement not ancillary to an employment  
25 relationship or employment contract.

26 (2) Existing common law standards governing a covenant not to  
27 compete agreement outside the employment background shall remain in effect.

28 ~~(i)(1)(j)(1)~~ This section ~~shall~~ does not apply to other types of  
29 agreements between employers and employees that do not concern competition or  
30 competitive work, including:

31 (A) Agreements not to solicit, recruit, or hire employees;

32 (B) Confidentiality agreements;

33 (C) Nondisclosure agreements; and

34 (D) The terms and conditions of an employment or  
35 employment agreement.

36 (2) Existing common law standards governing ~~these types of~~

1 ~~agreements~~ the agreements described in subdivision (j)(1) of this section  
 2 shall remain in effect.

3 (k)(1) The burden of proof shall be on an employer attempting to  
 4 enforce a covenant not to compete agreement.

5 (2) An employer that does not prevail in the employer's attempt  
 6 to enforce a covenant not to compete agreement against an employee is  
 7 responsible for the attorney's fees incurred by the employee.

8 ~~(j)(1)~~ This section shall does not:

9 (1) ~~Be read to impair~~ Impair, limit, or change a party's  
 10 protections and rights under the Arkansas Trade Secrets Act, § 4-75-601 et  
 11 seq.; or

12 (2) Apply to a person who:

13 (A) ~~holding~~ Holds a professional license under Arkansas  
 14 Code Title 17, Subtitle 3; or

15 (B)(i) Is a nonmanagement employee.

16 (ii)(a) As used in this section, "nonmanagement  
 17 employee" means an employee who is not employed in a supervisory role as  
 18 described in the employee's job description under the employer's written  
 19 policy.

20 (b) "Nonmanagement employee" does not include  
 21 an employee who is employed in a position that requires significant skill or  
 22 training.

23 (m) A covenant not to compete agreement between an employer and a  
 24 nonmanagement employee is unenforceable.

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 26 SECTION 2. DO NOT CODIFY. Legislative findings and intent.

27 (a) The General Assembly finds that:

28 (1) Many employers in Arkansas require a prospective or current  
 29 employee to sign a covenant not to compete agreement to gain employment or  
 30 remain employed;

31 (2) An employee in need of employment and a steady paycheck will  
 32 often sign a covenant not to compete agreement without reading and  
 33 understanding the terms and conditions outlined in the covenant not to  
 34 compete agreement;

35 (3) Often, an employer can prevent an employee from finding new  
 36 employment with a potentially higher salary or better benefits due to the

1 covenant not to compete agreement;

2 (4) In fact, an employee may not be able to find any job in  
3 their chosen field regardless of salary or benefits due to a covenant not to  
4 compete agreement;

5 (5) An employer is able to use a covenant not to compete  
6 agreement to keep an employee's salary static while at the same time  
7 preventing that employee from exploring any employment opportunities in the  
8 employee's chosen field;

9 (6) A covenant not to compete agreement is often the product of  
10 unequal bargaining power and an employee generally does not grant sufficient  
11 attention to the hardship that a covenant not to compete agreement imposes on  
12 the employee after the employee leaves the job;

13 (7) An employee is seldom able to dispute how unreasonable a  
14 covenant not to compete agreement is on the employee because the legal  
15 expenses incurred are too great;

16 (8) Many employers are not treating employees in a fair and  
17 equitable manner when requiring an employee to sign a covenant not to compete  
18 agreement to remain employed;

19 (9) Employers regularly require employees to sign a covenant not  
20 to compete agreement solely to restrain competition in the employment market  
21 rather than to protect a legitimate business interest such as trade secrets  
22 or genuinely confidential information;

23 (10) Many other states enforce covenant not to compete  
24 agreements less frequently than Arkansas;

25 (11) Some states prohibit the enforcement of covenant not to  
26 compete agreements in employment situations and yet those states have vibrant  
27 and flourishing economies;

28 (12) This demonstrates that existing law governing covenant not  
29 to compete agreements in Arkansas is not necessary for this state to have a  
30 well-functioning and dynamic economy;

31 (13) A better balance is needed between the legitimate interests  
32 of employers seeking to protect genuinely proprietary information on the one  
33 hand, and on the other hand, the rights of employees to economic freedom, the  
34 freedom of movement, and the values of free market competition; and

35 (14) It should be the choice of an employee as to where the  
36 employee is employed as it should be the choice of a consumer as to where the

1 consumer does business in Arkansas because consumer choice is a priority in  
2 business transactions and employees should have the same rights as consumers.

3 (b) This act does not affect the ability of an employer to protect the  
4 employer's trade secrets under the Arkansas Trade Secrets Act, § 4-75-601 et  
5 seq.

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